

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
TRAFFIC APPEAL NO.212 OF 1998**

JAMES OGUKU KARAYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT:

The Appellant, JAMES OGUKU KARAYA, was on 23rd September 1998 convicted of two counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, Cap 403. It was alleged in the charge that on 8th August 1997 at about 9.30 a.m. along Kebirigo/Ekerenyo road in Nyamira District, being the driver of M/V Registration No.KAA 660R, Isuzu minibus, he drove the said M/V in a manner which was dangerous to the public, having regard to the circumstances of the case, including weather conditions, the use of the road and the amount of traffic which was actually on the road at that time, or which might reasonably be expected to be on the road at the time, and thereby caused the deaths of one NYAKUNDI NYAKAMBA and one GEORGE GESABU. He was fined shs.11,000/= and in default to serve one year imprisonment on each count. He has appealed against both conviction and sentence.

The first ground of appeal is that the learned trial magistrate erred in law in considering the prosecution case separately and accepting the same as proved beyond reasonable doubt before first considering the defence case. The trial court also erred in rejecting the defence case without assigning any or sufficient reasons. In the second ground of appeal the appellant complains that the trial court erred in not attaching any or sufficient importance to the “contradictions, improbabilities and inconsistencies in the prosecution case”. The third ground of appeal reads:-

“The learned magistrate erred and misdirected himself in convicting the appellant on prefixes not pressed by the prosecution or proved beyond reasonable doubt on the totality of the evidence.”

I cannot quite understand this ground of appeal, but I will take it to be a complaint that the trial court convicted the Appellant upon evidence not presented or proved beyond reasonable doubt.

I have carefully read the record of the trial court. This being a first appeal it is my duty to evaluate the evidence on my own and arrive at my own conclusions on it. I must however remember that I neither saw nor heard the witnesses myself and give due allowance for that.

I am satisfied beyond reasonable doubt that the accident, which resulted in the two deaths, occurred as a result of a dangerous situation, which was authored by the appellant. This dangerous situation came about when the appellant, driving m/v KAA 660R attempted to overtake another m/v, KXZ 57, in the face of another on-coming m/v. He was not able to complete the maneuver as he risked having a head-on collision with the on-coming m/v, a lorry. So he cut in back into his lane and in the process hit m/v KXZ 570, thereby causing it to lose control and over-turn. The appellant’s claim that m/v KXZ 570 zig-zagged on the road and thereby caused the collision of the two m/vehicles is not borne out by the evidence. I must, however, hasten to add, that the appellant was under no obligation to prove anything.

The burden remained with the prosecution throughout to prove their case beyond reasonable doubt. I am satisfied beyond reasonable doubt that the prosecution discharged this burden. I find no merit in any of the grounds of appeal against the convictions, and I dismiss the appeal.

Regarding the sentences, the appellant obviously got off lightly with fines. Sentencing is a matter for the discretion of the trial court, unless it can be demonstrated that the sentence imposed is illegal or manifestly harsh or excessive. It has not been so demonstrated here.

In the result the appellant's appeal is dismissed in its entirety. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF AUGUST 1999.

H.P.G. WAWERU

JUDGE